

respondent's failure to establish probable cause requires a finding that the drug screen test results are not admissible.

The issues on this appeal are whether the results from the drug screen test are admissible, and if so, did drug use contribute to claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is undisputed that claimant suffered injuries in the course of her employment as a truck driver for the respondent. On May 3, 2002, claimant was passing a cattle truck when a vehicle in front of the cattle truck made a left turn in front of claimant. Claimant's truck hit the car and then ended up on its side in the ditch. Claimant received a traffic citation for passing in a no passing zone.

A urine sample was taken from claimant in the emergency room at the Central Kansas Medical Center in Great Bend, Kansas. Larry Davis, respondent's director of safety, noted that the urinalysis was conducted because it was required by federal regulation. He further noted:

Q.[Mr. Brumley] When you issued the test, you didn't - - when you requested the test, you didn't request the test thinking that there was drug use involved?

A. [Mr. Davis] No. We requested the test simply to make sure we were in compliance with the federal regulation.¹

Michael L. Hulsey, a Kansas Highway Patrol Trooper, investigated the accident. He testified:

Q. [Mr. Brumley] So any concerns related to any probable cause as to being under the influence of a drug or alcohol, that wasn't why the test was issued?

A. [Mr. Hulsey] No, sir. I had no probable cause to have a drug screen urinalysis - - breath, alcohol, there was nothing in the vehicle. I did not find any paraphernalia in my inventory search, and all probable cause was because she was driving a commercial motor vehicle and was injured.²

¹ Davis Depo., at 15-16.

² Hulsey Depo., at 10.

The ALJ concluded the urinalysis test results were not admissible because there was no probable cause to believe the claimant used or had possession of or was impaired at the time of the accident.

The Workers Compensation Act severely restricts the admission of drug screen test results. The Act provides that six factors must be proven before drug test results can be admitted into evidence:³

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

The Workers Compensation Act does not define probable cause. But the Board has determined the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker.⁴

Before the Board can consider the question regarding the admissibility of evidence, it must first consider whether it has jurisdiction to review this preliminary hearing finding. The Workers Compensation Act requires a definite foundation be laid before the results of a chemical test are admissible into evidence.⁵ Therefore, there exists a question of fact whether that foundation has been laid. In this case, the ALJ found the respondent had not

³ K.S.A. 44-501(d)(2).

⁴ *Evans v. Frakes Trucking*, 31 Kan. App. 2d 211, 64 P.3d 440 (2002).

⁵ See K.S.A. 44-501(d)(2).

established probable cause to believe that the claimant used, had possession of, or was impaired by the drug at the time of the work-related accident. Accordingly, the ALJ denied respondent's request for admission of the test results into the evidentiary record.

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in K.S.A. 44-534a or the Administrative Law Judge must have exceeded his jurisdiction as required by K.S.A. 44-551. The jurisdictional issues listed in K.S.A. 44-534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply.

Because the issue now before the Board is not one listed in the preliminary hearing statute, the question becomes whether the ALJ exceeded her jurisdiction.

As with other evidentiary questions at preliminary hearing, the Judge is charged with the responsibility of determining whether the evidence proffered has sufficient reliability, relevance and foundation to be considered, knowing that the hearing is summary in nature. The Board finds the Administrative Law Judge has the authority at a preliminary hearing to determine whether the respondent has met all the foundation requirements for a chemical test to be admitted into evidence.

The Board finds the ALJ did not act arbitrarily or capriciously in her exclusion of the proffered documents and, therefore, neither abused her discretion nor acted outside the scope of her jurisdiction. Therefore, the Board concludes it does not have jurisdiction to review the ALJ's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a drug screen test result.

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

AWARD

WHEREFORE, the Board finds that respondent's application for review should be dismissed and Administrative Law Judge Pamela J. Fuller's March 17, 2003, Order For Compensation remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation